No. 88-1309

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III as Attorney General of the State of Minnesota,

Cross-Petitioners,

—v.—

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A.; PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should a conditional Cross-Petition for Certiorari be granted where it fails to present substantial, meritorious issues for review previously raised by Cross-Petitioners in the proceedings below.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinions below are set forth at pages 10a-52a of the Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in *Hodgson, et al. v. State of Minnesota, et al.*, S.Ct. No. 88-1125.

The opinion of the district court is reported at 648 F. Supp. 756 (D. Minn. 1986).

The *en banc* opinion of the Eighth Circuit Court of Appeals is reported at 853 F.2d 1452 (8th Cir. 1988).

JURISDICTION

Respondents herein incorporate by reference the jurisdictional statement set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, S.Ct. No. 88-1125.

Respondents received copies of the Cross-Petition for a Writ of Certiorari on February 3, 1989. Pursuant to Rule 22.1 of this Court, a response may be filed within 30 days after receipt of a cross-petition.

STATUTES INVOLVED

Respondents herein incorporate by reference the statement of Statutes Involved set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, S.Ct. No. 88-1125.

COUNTERSTATEMENT OF THE CASE

Plaintiffs[1] herein incorporate by reference the Statement of the Case set forth in their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, S.Ct. No. 88-1125.

Curiously avoiding citations to the district court's opinion, the State of Minnesota, in its Statement of the Case, attempts to rewrite the district court's findings by misstating the testimony of plaintiffs' witnesses, and by drawing conclusions contrary to those of the district court.[2] In doing so, defendants rely on the testimony of their witness, Dr. Vincent Rue, who was discredited as an expert by the district court because he lacked the professional experience of plaintiffs' witnesses, and because his testimony was not persuasive. (29a); (40a-41a).[3]

1 The parties will be referred to with reference to their posture at trial. Respondents will be referred to as "plaintiffs" and cross-petitioners as "defendants." Citations to the Appendix of plaintiffs' Petition for a Writ of Certiorari, S.Ct. No. 88-1125, are made to the page number as "(__a)". References to the trial transcript will be denoted as "(T__)".

2 For example, defendants state that the purpose of the statute is to serve the state's interest in the family, Cross-Petition at 3 (hereinafter "C.P. at __"), but ignore the district court's finding that "a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature." (25a). Defendants allege that "parents are generally supportive in helping a minor deal with an unintended pregnancy." C.P. at 7. The district court, on the other hand, found that "when knowledge of an adolescent's pregnancy or abortion is inadvertently communicated to one or both parents, the effect of the communication on the family or relationship between adolescent and parents is 'almost universally negative.' " (28a-29a). Defendants state that "some" minors fear violence in their families and that "a very small minority" want to avoid telling a parent of their pregnancy because of this fear. C.P. at 4-5. This contradicts the district court's findings that "[m]any minors in Minnesota live in fear of violence by family members," and that the documented numbers underestimate the problem because "minors are particularly reluctant to reveal violence or abuse in their families." (30a). These are but a few examples of the defendants' mischaracterizations of the factual record.

The district court's extensive findings of fact have remained undisturbed on appeal. The *en banc* court of appeals did not conclude that the district courts' findings were clearly erroneous, (100a), and defendants do not argue to the contrary in their cross-petition.

This Court must "take the record as it comes," *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3rd Cir. 1986), *cert. denied sub nom. Township of Piscataway v. New Jersey Citizen Action*, 107 S.Ct. 1336 (1987), and review this statute as one "not supported by factual findings that it furthered in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity . . . ." (78a).

REASONS FOR DENYING THE CROSS-PETITION FOR A WRIT OF CERTIORARI

I. PARENTAL NOTICE LAWS MUST PROVIDE A BYPASS OPTION.

It is settled as a matter of law that parental notification of a minor's abortion decision requires a bypass alternative. Thus, the decision of the Eighth Circuit Court of Appeals striking Minn. Stat. Ann. § 144.343 subd. (2) as unconstitutional presents no serious issue for this Court to address.

A. It is settled law that parental notice requires a bypass alternative.

Notwithstanding the opinions of this Court and of every lower court to confront the question, defendants ask this Court to uphold a two-parent notice requirement with no judicial bypass alternative for mature minors or for those whose best

3 The district court found that, "Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses." (29a).

interests compel a private abortion choice.[4] *See* C.P. at 20. The state makes this request as to a provision of the Minnesota statute which was enjoined prior to implementation, has never gone into effect, and whose unconstitutionality was affirmed by the district court and by both a three judge panel and an *en banc* sitting of the court of appeals.[5]

This Court has repeatedly considered state law requirements of parental notice and those of parental consent under the uniform rubric of "parental involvement," and has made clear that states must, in either case, provide a meaningful judicial bypass option. *E.g., Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 n.10 (1983). This is because both parental notice and parental consent, required under threat of criminal sanction, severely burden a minor's ability to exercise her fundamental rights. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976).

The purpose of the bypass procedure is to insure that some minors remain able to exercise their right to terminate pregnancy *without* parental intervention. *Id. See also H.L. v. Matheson*, 450 U.S. 398, 420 (1981) (Powell, J., concurring); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (*Bellotti II*). Without such a waiver provision, all minors would be subject to parental efforts to obstruct their access to abortion, *see* discussion, Section I.B. *infra*, whether or not they are mature and whether or not parental consultation would be in their best interest. This would not sufficiently protect the fundamental

4 Indeed, in Minnesota, the judicial bypass procedure was frequently invoked by 20-25% of minors who, accompanied by one parent, sought judicial approval to avoid notifying the second parent. (22a).

5 Both at trial and on appeal, defendants failed to prevail on their argument that Minn. Stat. Ann. § 144.343 subd. (2), which mandated parental notification without providing a bypass alternative, was constitutional under the decisions of this Court. (38a); (58a) (panel decision). The Eighth Circuit Court of Appeals *en banc* upheld this finding. (81a). It is this issue which defendants raise once again in their Cross-Petition.

right of minors as recognized by this Court.[6] *Akron*, 462 U.S. at 441 n.31; *Matheson*, 450 U.S. at 420. *See Danforth*, 428 U.S. 52 (1976).

Mandatory notification is as burdensome to minors as a requirement of consent. *See* Section I.B., *infra*. In addition, this Court has declined to require a subjective determination of the *degree* of burden as a prerequisite for applying heightened scrutiny. *Akron*, 462 U.S. at 419 n.1. For these reasons, "a state choosing to encourage parental involvement [either through notice or consent] must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interest." *Id.* at 427 n.10 (citing *Bellotti II*, 443 U.S. at 643-44 (1979); *Matheson*, 450 U.S. at 420).[7]

Lower courts have also repeatedly held that both notification and consent require a statutory bypass alternative. In *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983), the Seventh Circuit held that a notification statute required the same constitutionally sufficient bypass procedure as a consent statute. *See also Zbaraz v. Hartigan*, 763 F.2d 1532, 1536 (7th Cir. 1985), *aff'd per curiam by an equally*

6 This right is shielded from impermissible state regulation by a heightened standard of review. Such laws must "plainly serve[ ] important state interests . . . [and be] narrowly drawn to protect only those interests." *Matheson*, 450 U.S. at 413; *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1537 (7th Cir. 1985), *aff'd by an equally divided court*, 108 S.Ct. 479 (1987). Because a minor's right is fundamental, it cannot be "balanced" against the interests of her parents as defendants suggest. C.P. at 20. *See generally* Section II, *infra*.

7 "[A] state may not validly require notice to parents in all cases, without providing an independent decisionmaker to whom a pregnant minor can have recourse if she believes that she is mature enough to make the abortion decision independently or that notification otherwise would not be in her best interests." *Matheson*, 450 U.S. at 420 (Powell, J., concurring). *Matheson* upheld a notice requirement *only* as applied to immature, dependent minors. A majority of the court held that notification was unconstitutional as applied to mature or "best interest" minors without a meaningful bypass procedure. *Id.* at 414 (Powell, J., joined by Stewart, J., concurring); *id.* at 450-54 (Marshall, J., joined by Brennan and Blackmun, J.J., dissenting).

divided court, 108 S.Ct. 479 (1987). A notification requirement "cannot be supported in the case of a mature minor or a minor whose best interests do not include parental notification of the abortion decision" and, therefore, must be accompanied by a bypass alternative to permit evaluation of these factors by an impartial decisionmaker. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988), *aff'g, Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1132-33 (N.D. Ohio 1986), *appeal filed sub nom. Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 29, 1988) (No. 88-805) (*Rosen*). *Accord, Planned Parenthood v. Harris*, 691 F. Supp. 1419, 1423 (N.D. Ga. 1988); *Glick v. McKay*, 616 F. Supp. 322, 325 (D. Nev. 1985). *Cf. Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 634-35 (D.R.I. 1984) (striking a spousal notification statute).

The district court decision, (38a), the panel decision, (53a), and the *en banc* decision of the circuit court, (81a), rested on established, uncontroverted constitutional principles in finding Minn. Stat. Ann. § 144.343 subd. (2), standing alone, to be unconstitutional because it required parental notice without also providing a bypass alternative.

B. The record conclusively establishes that mandating two-parent notice imposes a burden which is in fact comparable to that of parental consent and which, therefore, requires a bypass alternative.

In holding that notice and consent require like constitutional treatment, the cases discussed above acknowledge that mandatory notification imposes burdens on minors which are comparable to those imposed by consent, a finding fully supported by the record of this case. Indeed, this record unequivocally demonstrates that notification in fact serves to give parents opposed to abortion the opportunity to veto their minor daughter's abortion choice. Because there is no evidence to the contrary, and because the district court's findings have not even been alleged to be erroneous, no serious issue as to the unconstitutionality of this holding is presented for review.

There are numerous examples in the record of the consequences of involuntary parental notification. These include: increased violence toward the minor, including physical and sexual abuse (140a-141a); the minor being thrown out of the house (123a); and the minor being disowned by her family (126a). The district court noted these detrimental and potentially devastating effects stating, "[n]otification of the minor's pregnancy and abortion decision can provoke violence," (31a), and some "parents [are] likely to react with psychological, sexual, or physical violence toward . . . the minor . . . ." (21a).[8] The severity of a parent's reaction to notification underscores how, for a dependent minor, the effect of parental notice is comparable to that of consent.

This Court has previously acknowledged that "young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Bellotti II*, 443 U.S. at 647, *quoted in Hodgson v. Minnesota*, 648 F. Supp. 756, 773 (D. Minn. 1986). Lower courts have also consistently recognized that "as a practical matter, a notification requirement will have the same deterrent effect on a minor seeking an abortion as a consent statute has." *Pearson*, 716 F.2d at 1132. *See also Rosen*, 633 F. Supp. at 1132-33 ("[p]arental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion"). The deterrent effect of the statute is the same, whether it mandates notification or consent.

Further, the unique way in which the Minnesota statute is written eliminates even the formal distinction between a notification and a consent statute. In Minnesota, minors are required to provide clinics with written proof of parental notification. (Wendt, T 48, 65-66) (Welsh, T 128). The statute compels this result. The most common means of notifying a parent who does not accompany a minor to the clinic is by certified mail "*return*

8 Judges and experienced counselors repeatedly found that minors' assessment of their situations were credible and accurate. (114a-115a); (122a-123a); (126a); (Wendt, T 41).

receipt requested." *See* Minn. Stat. Ann. § 144.343 (2)(b) (emphasis added); (1a). The parent's signature on the return receipt provides clinics with written proof that notice has occurred. Clinics require written proof of notice because the statute requires *written* evidence of compliance with its terms in order to avoid criminal or civil liability. Minn. Stat. Ann. § 144.343 (5); (2a-3a); (Wendt, T 48, 65-66); (Welsh, T 128).

Because written proof of notice is required, a parent can withhold the necessary proof, thereby delaying or obstructing a minor's abortion entirely.[9] The factual record in this case is replete with evidence that some parents, when notified of a minor daughter's decision, will attempt to obstruct her access to abortion services. One father, when notified, "refused to acknowledge his paternity," causing a two-week delay of the minor's abortion. (119a). Another father, who "hadn't had contact with his daughter for quite some time," (Wendt, T 71-72), initially refused to sign the certified letter. *Id.* at 72. Although he was eventually persuaded to sign the receipt, this man effectively delayed his daughter's abortion. *Id.* at 72-73. Another father stated that he would stop his daughter's abortion, but relented when the mother of the girl drove by his house and fired a gunshot at his front door. His refusal caused a delay of several days in performing the abortion. *Id.* at 78-79. These examples reveal that many parents in Minnesota understood the notification requirement to grant them the ability to withhold consent.[10] On many occasions this pervasive misunderstanding has delayed, deterred, or entirely prevented minors from obtaining the abortion it is their right to choose.

9 Because written proof of notice must be obtained, parents must affirmatively cooperate with a minor who seeks an abortion. Predictably, this affirmative act will be withheld if a parent disapproves of the abortion decision.

10 Clinic personnel have also reported confusion about whether the statute actually requires parental notice or consent. Some of this confusion may have arisen from the statutory provision that alleviates the need for parental notice if written proof of parental *consent* is given. Minn. Stat. Ann. § 144.343 (4)(b); (2a).

In this case, the district court held that mandatory two-parent notification without a bypass option "unduly burden[ed] the exercise" of a minor's right because "there are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise the right." (38a) (citing *Bellotti II*, 443 U.S. at 647; *Pearson*, 716 F.2d at 1132). The district court, relying on Supreme Court precedent and the factual record, concluded that subdivision (2) of the statute could not stand. The factual finding that mandatory notice is unduly burdensome is unassailable.

II. THIS COURT SHOULD REAFFIRM THAT, IN THE CONTEXT OF ABORTION, PARENTS' RIGHTS ARE NOT INDEPENDENT OF THE BEST INTERESTS OF THEIR MINOR DAUGHTER.

Conceding that parental consent without a bypass may be impermissible, the State of Minnesota nevertheless asks this Court to create a "general [parental] right to notice." C.P. at 20. But the interests of parents recognized by this Court have never been endowed with the status of independent rights to be "balanced" against those of the minor. Indeed, these interests have no status independent of the best interests of the minor, to which they are entirely subordinated under the decisions of this Court. As stated in *Bellotti II*, "[i]n the case of the abortion decision . . . the focus of the parents' inquiry should be the best interests of their daughter." 443 U.S. at 649. In sum, the state's interest in "encouraging parental involvement in their minor children's decision to have an abortion . . . must give way to the constitutional right of a mature minor whose best interests are contrary to parental involvement." *Akron*, 462 U.S. at 427 n.10.[11]

11 Even in *Prince v. Massachusetts*, 321 U.S. 158 (1944), a case cited by defendants, C.P. at 15, this Court found that the best interests of the child, and not parental rights, were paramount. While acknowledging that the "custody, care and nurture of the child reside first in the parents," this Court also noted that the "rights of parenthood are [not] beyond limitation." *Id.* at 166. In fact, in *Prince*, this Court upheld a mother's conviction for violation of the state child labor statute because the best interest of the child overrode the rights of the parent. *See also Matheson*, 450 U.S. at 449 (Marshall, J., dissenting).

Therefore, while the state may legitimately protect immature minors whose best interests are served by parental involvement, "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Bellotti II*, 443 U.S. at 641. Laws that require parental involvement may "not unduly burden the right to seek an abortion." *Id.* at 640. A law that requires notification of both biological parents without any bypass option does just that.

CONCLUSION

For the foregoing reasons, this Court should refuse to grant defendants' Cross-Petition for a Writ of Certiorari.

Dated: March 6, 1989

Respectfully submitted,

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